



**[4310-W7-P]**

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

**Preliminary Plan for Distribution of Judgment Funds to the Loyal Mdewakantons**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of hearings and request for comments

**SUMMARY:** The Department of the Interior is developing a plan for distribution of judgment funds to the Loyal Mdewakantons if funds are appropriated in satisfaction of a final judgment. The distribution plan includes a determination of the criteria for eligibility to participate in any award.

**DATES:** Comments on the preliminary plan must be received by November 1, 2012. The Department will hold in-person hearings on the preliminary plan on October 30, 2012, from 6:00 PM to 10:00 PM in Sioux Falls, South Dakota at the Best Western Plus Sioux Falls Ramkota Hotel, 3200 W. Maple Street, and on November 1, 2012, from 6:00 PM to 10:00 PM in Bloomington, Minnesota at the Ramada Mall of America, 2300 East American Boulevard.

**ADDRESSES:** Send comments to David Christensen, Tribal Operations Officer, Bureau of Indian Affairs, Midwest Regional Office, Norman Pointe II, 5600 West American Boulevard, Suite 500, Bloomington, MN 55437.

**FOR FURTHER INFORMATION CONTACT:** David Christensen, Tribal Operations Officer, Bureau of Indian Affairs, Midwest Regional Office, Norman Pointe II, 5600 West American Boulevard, Suite 500, Bloomington, MN 55437; telephone (612) 725-4554.

**SUPPLEMENTARY INFORMATION:**

On August 5, 2011, as corrected by Order dated August 18, 2011, the Court of Federal Claims directed the Secretary of the Interior to prepare and submit to the Court a roll of eligible claimants and a distribution plan for funds arising from the judgment in *Wolfchild, et al. v. United States*, Docket Nos. 03-2684L & 01-568L, under the Indian Tribal Judgment Funds Use or Distribution Act (25 U.S.C. 1401-1407). The Secretary has developed a preliminary plan for distribution of the \$673,944 judgment among an estimated 20,750 or more potential beneficiaries. Based on the estimated 20,000 or more potential claimants represented in the court action, individual payments are likely to be in the \$20.00-\$40.00 range. The underlying judgment of the Court is the subject of appeals by the parties and, as such, no funds have yet been made available for any distribution.

Interested parties should note that the individual Plaintiffs and the Defendant in the underlying litigation have appealed the CFC's judgment to the United States Court of Appeals for the Federal Circuit. (See, Fed. Cir. Case Nos. 2012-5035, -5036, -5043 (consolidated), Appeal from the United States Court of Federal Claims in Consolidated Case Nos. 03-CV-2684 and 01-CV-0568.) Because the parties have filed appeals to the Federal Circuit, the CFC's judgment is not final and the Department of the Treasury has not appropriated any funds to be distributed.

In furtherance of complying with the Court's order to "complete preparation of such roll and plan satisfying the criteria specified in 25 U.S.C. 1403" the Department, in accordance with 25 CFR 87.3(b), will hold hearings on the record in Sioux Falls, South Dakota on October 30, 2012, and in Bloomington, Minnesota on November 1, 2012 to receive testimony on the preliminary plan. Written testimony will also be accepted at the hearings or can be sent to the address in the ADDRESSES section of this notice. Please be advised that your testimony,

whether oral or written, may be made publicly available at any time. While you can request that any personal identifying information contained in your testimony be withheld from public review, we cannot guarantee that we will be able to do so.

The preliminary plan for the distribution of these funds reads as follows:

**Draft Report and Preliminary Plan**

*For the Use and Distribution of Judgment Funds Awarded to the Descendants of the Loyal Mdewakanton in Docket Nos. 03-2684L & 01-568L, before the United States Court of Federal Claims*

Background

The Department of the Interior respectfully submits this plan for the distribution of \$673,944.00, awarded by the Court of Federal Claims in the case of *Wolfchild v. United States*, Dockets No. 03-2684L & No. 01-568L, August 5, 2011. *Wolfchild v. United States*, 101 Fed. Cl. 54 (2011) (as corrected August 18, 2011). The court remitted and remanded to the Secretary the work of preparing a plan for the distribution of the funds, setting forth the criteria for eligibility, and then developing a roll of eligible claimants.

This case was brought in 2003 by a group of individuals who claim to be the lineal descendants of the 1886 Mdewakantons, called the “loyal Mdewakantons.” Over time, more individuals have joined the suit as plaintiffs or plaintiff-interveners, and this number is now

estimated as exceeding 20,750. The litigation has yielded various and sometimes competing theories and definitions of a “loyal Mdewakanton” that would be eligible to share in an award.

In August 1862, the Minnesota Sioux<sup>1</sup>, then living on two reservations in Southern Minnesota, rebelled against the United States. The uprising resulted from the needless delay in distributing promised treaty annuities, including food, to the starving Indians. The United States responded with military force, and many of the Indians were expelled from Minnesota or captured. After the rebellion was quelled, Congress abrogated and annulled the treaties that had established the reservations and that had provided an annuity to be paid to the tribes. The Minnesota Sioux reservation lands in Minnesota were confiscated, and most of the Sioux were forced to relocate further west.

Even in the aftermath of the uprising, when the Congress was debating the bill that would investigate the hostilities and impose punitive measures, recognition was given to the existence of a group of Indians who “have been faithful to the whites, have defended them, and who have saved their lives in Minnesota.” Many of those individuals, because of their actions, severed their ties to the tribe and remained in Minnesota. The government’s confiscation of the Sioux lands in Minnesota and the forfeiture of the annuities that had been paid pursuant to the abrogated treaties left those individuals poverty-stricken and homeless. In acknowledging the contributions of this group, consisting of about 200 individuals, Congress authorized the Secretary of the Interior to convey 80 acres of public land to “each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians.” Act of February 16, 1863, 12 Stat. at 654. Two weeks later, Congress enacted another statute providing: [I]t shall be lawful for [the] Secretary [of the Interior] to locate any meritorious individual Indian of [the four]

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<sup>1</sup> The Minnesota Sioux consisted of 4 bands: the Sisseton, Wahpaton (upper bands), Wahpakootas and Mdewakantons (lower bands). Contemporaneous accounts put most of the blame for the rebellion on the lower bands. [Report of the Secretary of the Interior, 1866; Joint Appendix, Ex. 32]

bands, who exerted himself to save the lives of the whites in the late massacre, upon [the former Sioux reservation lands] on which the improvements are situated, assigning the same to him to the extent of eighty acres, to be held by such tenure as is or may be provided by law . . . [provided] [t]hat no more than eighty acres shall be awarded to any one Indian, under this or any other act.” Act of March 3, 1863, ch. 119, section 4, 12 Stat. at 819.

The Secretary never exercised the authority granted by the 1863 legislation to provide lands to the friendly Sioux, due to the intense opposition of the white settlers. In regard to the friendly Sioux remaining in Minnesota, the 1866 Report of the Secretary of the Interior noted “it is noticeable that Congress has, by several enactments, made attempts to provide for them by donations of land and money; but it has been found impracticable to accomplish anything under those acts, on account of the hostility manifested by the white people of that region towards everything in the form of an Indian. Many of these men have, for the past three years, been homeless wanderers, and actually suffering from want: a very poor return for services rendered to the whites for the risk of their lives.”

Efforts to provide for the Minnesota Sioux who had aided the settlers during the Sioux Uprising continued. In 1888, 1889, and 1890, Congress enacted legislation appropriating funds for the support of a number of designated Indian tribes. Motivated by the failure of the 1863 Acts to provide relief, Congress included in each of these statutes, known collectively as the “Appropriations Acts”, a paragraph allocating a small sum to be used for the benefit of the Mdewakantons who had remained in Minnesota after the 1862 revolt or had returned to Minnesota in the following years.

The 1888 Act appropriated \$20,000 “to be expended by the Secretary of the Interior” in purchasing land, cattle, horses, and agricultural implements for the “full-blood Indians in

Minnesota belonging to the Mdewakanton band of Sioux Indians, who have resided in [Minnesota]” since May 20, 1886, and who have “severed their tribal relations.” Act of June 29, 1888, ch. 503, 25 Stat. 217, 228-29. In 1889, Congress appropriated a further sum of \$12,000 “to be expended by the Secretary of the Interior” for the “full-blood” loyal Mdewakanton residing in Minnesota since May 20, 1886, or “who were then engaged in removing to said State.” Act of March 2, 1889, ch. 412, 25 Stat. 980, 992-93. The 1889 Act was substantially similar to the 1888 Act but included three additional provisions not included in the 1888 Act. Unlike the 1888 Act, the 1889 Act required the Secretary to expend the appropriated funds in a manner such that each loyal Mdewakanton received as close to an equal amount as practicable. Additionally, the 1889 Act mandated that any money appropriated in the 1889 Act not expended within the fiscal year would not be recovered by Treasury, but rather would be carried over to the following years and expended for the benefit of the loyal Mdewakanton. The 1889 Act made the “equal amount” requirements applicable to the money appropriated under the 1888 Act as well. In 1890, Congress appropriated an additional \$8,000 and adopted the same substantive provisions as the 1889 Act, except that it expressly stated that the further appropriated amount was to support Indians of both “full and mixed blood.” Act of August 19, 1890, 26 Stat. 336, 349. The 1889 and 1890 Acts also differed from the 1888 Act by granting the Secretary discretion based on what “may be deemed best in the case of each of these Indians *or family thereof.*” *Id.* at 992 (emphasis added). The 1888 Act, on the other hand, made no explicit mention of the loyal Mdewakantons’ families as beneficiaries of the appropriations. *See* 25 Stat. at 228-29.

The Department of the Interior used approximately \$15,600 of the \$40,000 appropriated under the three Appropriations Acts to purchase parcels of land in various parts of southern Minnesota where the Mdewakantons had settled. Because of difficulties in determining which of

the Mdewakantons qualified as “loyal” during the 1862 uprising, the Appropriations Acts provided that the appropriations would be designated for the benefit of all Mdewakantons who were living in or in the process of removing to Minnesota as of May 20, 1886. As a result, the lands purchased with funds from the three Appropriations Acts are known as “the 1886 lands,” and the Mdewakantons who were statutorily eligible for benefits under the Acts are commonly referred to as “the 1886 Mdewakantons.” The Department of the Interior assigned individual plots from those lands to qualifying Mdewakantons for their use and occupancy, so long as they resided on or otherwise used the land.

The text delineating the beneficiary class in each Appropriation Act varied in minute respects, but the essential thrust of the Acts was Congress’ desire that loyal Mdewakanton would be identified as those Mdewakanton who had severed their tribal relations and who had either remained in, or were removing to, Minnesota as of May 20, 1886. To determine the persons who would be considered “loyal” Mdewakanton under Congress’ definition and thus would receive the benefits of the Appropriations Acts, the Department of the Interior relied upon two censuses: the McLeod listing and the Henton listing. The McLeod listing was generated in 1886 by U.S. Special Agent Walter McLeod and listed all of the full-blood Mdewakantons remaining in Minnesota at the time. Under the Secretary’s direction, on January 2, 1889, a supplementary census was taken by Robert B. Henton, Special Agent for the Bureau of Indian Affairs (“BIA”), of the Mdewakanton living in Minnesota since May 20, 1886. That listing included some mixed bloods. Together, these listings were used to distribute the benefits of the Appropriations Acts to those persons whose names appeared on the lists, and subsequently, to lineal descendants of those listed persons.

Over time, funds were generated by the use, sale and leasing of the 1886 lands, which

were placed in Treasury trust fund accounts. Some of these funds were obtained from a transfer of a portion of the 1886 lands by the United States to the Upper Mississippi River Wildlife and Fish Refuge (“the Wabasha Land Transfer”). The remaining portion of the money, however, stemmed from Interior’s policy of leasing or licensing 1886 lands for fair market value where no eligible Mdewakanton or lineal descendant was available for a land assignment. In 1975, the BIA performed a detailed accounting of all funds derived from the 1886 lands then held by the Treasury. After deduction of the Wabasha Land Transfer funds, the sum remaining attributable to the 1886 lands amounted to \$60,464.02.

Pursuant to the Indian Reorganization Act of 1934, three Mdewakanton communities were formed in the three areas where the 1886 lands were located. The three communities are the Prairie Island Indian Community, the Shakopee Mdewakanton Sioux Community, and the Lower Sioux Indian Community. The enrolled membership of the three communities consists largely of lineal descendants of the Mdewakantons who were living in Minnesota in 1886, but some enrolled members are not descendants of the 1886 Mdewakantons, and many of the descendants of the 1886 Mdewakantons are not enrolled members of any of the three communities. Over time, the government purchased additional land for the Prairie Island and Lower Sioux communities. Those lands were regarded as reservation lands and as such were held in trust for those two communities. Prior to 1980, those reservation lands were treated as having a legally distinct status from the 1886 lands, even though parcels of the two classes of property were intermingled in the same areas within the geographical boundaries of the Prairie Island and Lower Sioux communities.

In 1980, Congress enacted legislation designed to give the three communities political control over all the property within the communities that had been set aside for Indians,



including the 1886 lands. *See* Pub. L. No. 96-557, 94 Stat. 3262 (1980) (the “1980 Act”). The 1980 Act provided that the 1886 lands, which “were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians” under the Appropriations Acts, would henceforth be “held by the United States . . . in trust for” the three communities. *Id.* That legislation did not address the funds derived from the 1886 lands then being held by the Treasury. However, in 1981 and 1982 those funds were distributed to the three communities.

The Court of Federal Claims found that the transfer of monies derived from the 1886 lands to the three communities was not authorized by the 1980 statute, and that the “loyal Mdewakantons” referenced in the Appropriations Acts should have been the beneficiaries. As referenced above, the Department of the Interior is directed to determine which claimants are the proper beneficiaries of the Appropriations Acts, and who are therefore entitled to share in the judgment. This process also entails consideration of the various theories of recovery advanced by the plaintiffs in the court case in order to establish the proper criteria for determining the class of persons the Appropriations Acts were intended to benefit.

Various iterations have emerged as to how to define “loyal Mdewakanton” and how to determine the lineal descendants of such loyal Mdewakantons with respect to who should be the intended beneficiaries of the Appropriations Acts. The contentions fall into three general categories:

One iteration is that loyal Mdewakantons are limited to those individuals appearing on censuses carried out at the direction of the Secretary of the Interior in 1886 (the McLeod census) and 1889 (the Henton census) specifically to identify the intended beneficiaries of the Acts. The criteria specified in the Acts are Mdewakanton residing in Minnesota on May 20, 1886 (or who

were in the process of removing there), and who had severed their tribal relations. As noted above, the 1890 Act made provisions to include both full and mixed blood Mdewakantons.

A second iteration goes beyond the McLeod and Henton censuses to define eligibility and would also rely on lists of individuals who were scouts, or who rescued whites, or who performed other meritorious services to aid the settlers during the uprising. This position is supported by the fact that legislation enacted in 1863 pertaining to Mdewakantons employed other standards. Those acts were not restricted to the Mdewakanton, and spoke of “meritorious” or “friendly” Indians who had “exerted themselves” to rescue the white settlers. This position would counsel toward the use of additional source documents that reflect individuals not listed in the 1886 and 1889 censuses who had been “loyal” or “friendly” and therefore in the class that Congress intended to benefit. These other sources might include:

1862 Indian Camp Census, Report No. 156 in *Report of U.S. Commissioner of Indian Affairs, 1863*. This list consists of the Sioux Indians and “half-breeds” under the surveillance of the U.S. military authorities at Camp Snelling, Minnesota during the winter of 1862. The list included the families of Indians accused of fomenting the uprising jailed at Davenport, Iowa; Indians who had been acquitted of responsibility, and a number of scouts.

Camp Release Census 1863, Stephen Riggs Family Papers, Box 1, Minnesota Historical Society. This census was of captives released to Colonel Sibley, which included 162 mixed bloods.

Congressional Globe, 37<sup>th</sup> Cong., 3D Session at 514. The Globe contains the transcription of a discussion on the floor of Congress on January 26, 1863, regarding the 1862 uprising. Correspondence from the Commissioner of Indian Affairs is introduced, containing a petition for

assistance from Indians who had rescued whites in the uprising, and suffered ill-treatment from both whites and other Indians.

Sibley Sioux Scout List-1863 Sibley Expedition, May 28, 1863, Sibley Papers, Minnesota Historical Society Collections, 10:611. This list is of Indian scouts who were retained and recruited for the Sibley Expedition to pursue hostile Indians that left the State of Minnesota to escape any penalties for their participation in the 1862 uprising.

1866 Report of the Secretary of the Interior. This report, dated April 20, 1866, includes the names of individuals that deserve the “gratitude of the American people for having been principally instrumental in saving the lives of white women and children during the late Indian war.”

Payroll to Soldiers and Scouts 1891-92 (S.H. Elrod Scout and Soldier List) (National Archives and Records Administration). This document is a listing of scouts for the United States military of Sioux descent during and subsequent to the uprising, who received per capita payments under Congressional appropriations in 1893 and 1895.

1891 Samuel Brown Scout List - Census. A list of the frontier Scout Force of Fort Wadsworth, Dakota Territory was found in the personal papers of Samuel Brown, who served there as an interpreter and the superintendent of government scouts. The list was apparently compiled for the distribution of back annuities for members of the Sioux tribe who had served as scouts in the Indian Wars, provided for in the Indian Appropriations Act of 1891.

A third iteration recognizes that “mixed blood” Mdewakantons were not included on the 1886 and 1889 censuses used to determine receipt of benefits under the Appropriations Acts, but these mixed bloods were specifically mentioned as beneficiaries in the 1890 Act. This position

would counsel toward consideration of later censuses that were perhaps more likely to include mixed bloods and those who may not have been present for the 1886 and 1889 counts but were “in the process of removing to Minnesota.” Later enumerations of Mdewakanton in Minnesota include:

Birch Cooley Census of Mdewakanton Indians, Robert B. Henton, 1891-93, 1895-98.

Robert Henton was commissioned by the Secretary of the Interior to conduct the census of 1889 of Mdewakanton Indians in Minnesota. These subsequent lists of full and mixed-blood Mdewakantons at the Birch-Cooley Agency appear to be a continuation of his earlier work, given the inclusion of mixed-bloods as recipients of the 1890 Appropriations Act.

Census of Mdewakanton Sioux of Minnesota, James McLaughlin, 1899.

An 1899 letter from the Commissioner of the BIA references this census as a refinement of the earlier work done by Robert Henton to enumerate the Mdewakantons entitled to the benefits of the Appropriations Acts.

1917 Census of Mdewakanton Sioux Indians. This census was created by Interior as part of a Court of Claims judgment in favor of the Mdewakanton and Wahpekoota Band of Sioux Indians.

**Proposed finding on criteria for a “Loyal Mdewakanton” eligible to receive an award**

The Appropriations Acts defined the loyal Mdewakantons and intended beneficiaries of the Act as (1) Indians in Minnesota, belonging to the Mdewakanton Band of Sioux Indians, (2) who resided in the state on May 20, 1886, or were in the process of removing to Minnesota, and (3) who have severed their tribal relations. A review of Interior Department memoranda, correspondence and administrative determinations dating from 1886 through 1982 shows these

as the criteria consistently applied in making or evaluating assignments for the 1886 Lands. Because the funds that form the basis of the proceeds in this case derive from those lands, the same criteria should apply in determining who is eligible to share in any funds awarded pursuant to the judgment.

Over the 100 years between the 1880s to the 1980s, the Department of the Interior made official eligibility determinations for 1886 Land assignments, created various rolls of eligible individuals, and often issued certificates to assignees. We adopt these documents as probative of eligibility for 1886 Land Assignments and proxy for membership in the group of intended beneficiaries of the Appropriations Acts. Documents which have previously been sanctioned by the Department for this purpose are:

- (1) The 1886 McLeod Census
- (2) The 1889 Henton Supplemental Census
- (3) The 1917 McLaughlin Roll (with additional proof of Mdewakanton descent for persons appearing on that roll)
- (4) Certificates assigning 1886 lands

We now add to this list of probative documents:

(5) the Birch Cooley Censuses prepared by Robert Henton; and

(6) the 1899 roll prepared by Inspector McLaughlin.

These additional rolls also were prepared at the direction of the Secretary of the Interior for the purpose of determining eligibility under the Appropriations Acts.

We determine that the class of persons eligible to participate in any final judgment of the Court of Federal Claims are those who can submit proof of descent from any individual listed on the documents adopted as probative above.

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Diane Rosen, Midwest Regional Director

September 21, 2012\_  
Date

[FR Doc. 2012-24120 Filed 09/28/2012 at 8:45 am; Publication Date: 10/01/2012]